UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE: 15-mc-40 (AKH)

AMERICAN CAPITAL PROPERTIES, INC. LITIGATION

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New York, N.Y.
October 3, 2019
2:55 p.m.

Before:

HON. ALVIN K. HELLERSTEIN

District Judge

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THE COURT: Rather than go through an introduction of counsel, all of whom have already been introduced in this court numerous times, just, before anyone speaks, identify yourself.

The purpose of today's session is to consider whether or not I should give preliminary approval to a very large settlement, after a very hard-fought, I would say tenaciously fought and protractedly fought litigation.

So, Ms. Wyman, are you going to present this?

MS. WYMAN: Yes, your Honor.

THE COURT: OK. Would you please take the podium and do so.

MS. WYMAN: I'm pleased to be here to present the settlement, your Honor.

THE COURT: Speak loudly, please.

MS. WYMAN: Yes. I'm pleased to be here to present this settlement to your Honor after all these years.

As outlined in our brief, the settlement amount is for $1,025,000,000 in cash. That settlement fund is to be deposited into an escrow account within ten days of your Honor's preliminary approval order.

Additionally, within ten days of your preliminary approval order, defendants are to provide lead counsel with a couple of pieces of information that will help the administration of the settlement fund, that being the identities of the parties that have settled or provided

releases to them.

THE COURT: Ms. Wyman, you're talking too low.

MS. WYMAN: I'm sorry. Within ten days of your preliminary approval order, in addition to the deposit of the settlement funds --

THE COURT: The microphone is misleading. It really doesn't work. So speak loudly.

THE CLERK: Ms. Wyman, you can use the other one.

MS. WYMAN: I can speak much louder. So can you hear me better now?

THE COURT: Yes.

MS. WYMAN: OK. So one of the things that the defendants are also going to do, VEREIT is also going to provide us with the names of the parties that have settled with them previously and people that have given them releases, as your Honor --

THE COURT: Why is that relevant?

MS. WYMAN: Because your Honor will remember that there were a number of opt-out cases that have settled prior to now.

THE COURT: Yes.

MS. WYMAN: And that information will help us administer the settlement fund so that there is no double-dipping of claims from those released parties.

THE COURT: OK.

MS. WYMAN: They are also to provide us with the scope of those releases to the extent that it captures assigns or successors, etc., of the opt-out plaintiffs that they have settled with previously.

Another piece of information that they're going provide to the claims administrator is, to the extent it's in their possession, they're going to provide us anonymized trading data for those settling parties as a double-check for us to use against claims that are made into the settlement fund so that we can try and identify anybody that is either claiming mistakenly or by purpose into the settlement fund that's already been paid and released, the claims that have been adjudicated in this case.

So these are the things that are going to happen. And in response to all that, the plaintiffs are going to provide, there will be mutual releases between the parties. So that that's essentially the big-picture terms of the settlement that we've got going on.

I don't know if you want to go through each of the factors under Rule 23(e)(2).

THE COURT: I do.

MS. WYMAN: OK. There are a number of factors that your Honor has to consider in preliminarily approving our settlement. One of those is, under 23(e)(2)(A), your Honor has to make a preliminary determination that counsel have

adequately represented the class.

THE COURT: I do so. I see you have worked and I see you have prepared your presentations. You have done a very good, very competent, and very professional job. We needn't go further on that.

MS. WYMAN: Thank you, your Honor.

The next factor that needs to be considered in Rule 23(e)(2) is whether or not the settlement has been negotiated at arm's length. And as we've described in our moving papers --

THE COURT: I so find. I know how hard fought this case was. The sums themselves suggest that they were very hard fought, though I'd like to get more justification on that when you come to it. Lane Phillips is a well-known and highly competent mediator, and it took him a number of sessions to settle with you. And I know you were seemingly very eager to try the case, as I was also. So I can easily find that there was zealous representation, and do so.

MS. WYMAN: Thank you, your Honor.

The next factor that you need to consider under Rule 23(e)(2)(c) is whether or not the release provided by the settlement is adequate. And there is a number of subfactors for you to consider in making that determination, the first being the costs, risks, and delay of a trial and appeal in this case. As your Honor well knows, the trial in this case was

estimated to last weeks, six to eight weeks to be exact.

THE COURT: That was your estimate. It wasn't mine.

MS. WYMAN: The issues were very complex. There were over 40 defendants. Dozens of lawyers would be involved. Many, many expert witnesses, a lot of competing expert opinions would have been offered to the jury. And it would have been an expensive undertaking, as you can well imagine.

THE COURT: I think it would have been a very expensive undertaking. I'm not so sure it would have been so difficult for a jury to understand the issues that were involved. Basically the main issue had to do with funds from operations. And it's a concept that seems strange to a lot of people but it can be explained pretty easily. And what was supposedly the misstatement also could be explained easily. That's not to say that's the end of the case. There were large elements of causation that had to be proved. There were other statements in the offering documents that had to be compared. It would have been a complex undertaking. It would have been very expensive and would have taken a considerable amount of time, even though we had spent a lot of time before the settlement and would not be spending relatively that much after the settlement. But I think it is sufficiently clear that this would be a difficult trial. The greatest difficulty would have would be a number of parties that were involved. And the more parties you have, the more tendency there is to have a lengthy

trial. And that's a big expense.

Defendants' counsel don't compete, and I think, although you have been paid on a day-to-day basis, your search for funds would have been greater also, because of the greater time that you would have put into it. So it clearly is a cost-saving and time-saving, and it's clearly a saving to the Court, in that I don't have to spend all the judicial time and energy on this case. So that factor is clear too.

MS. WYMAN: And let us not forget, too, no matter what the outcome of the trial, there likely would have been appeals from it, so it could have been years before things were resolved, or we may have been back before your Honor after a trip to the Second Circuit. It's unknown at this point.

THE COURT: That is very much so. Before there would be finality, you could have to go through three or four years of litigation.

MS. WYMAN: That's right.

And while TIAA was very confident in its claims and the evidence that had been generated in support of those claims during discovery, the defendants were very formidable opponents. And they have defenses that they would have very aggressively presented to the jury. So there was no guarantee that we were going to walk away with a victory at the end of the day. So that's one of the things that has to be taken into consideration, the risk of the jury accepting the defenses that

they would offer versus an immediate and certain payment now of approximately 50 percent of the recoverable damages.

THE COURT: That's a point that I would like you to develop. There's a lot of money involved here. The settlement is for $1.025 billion. But it's said that the estimate of recoverable damages was over $2 billion. So if the sums were smaller, a 50 percent recovery would not be so great. Why should it be different because the sums are larger?

MS. WYMAN: Well, I think that a 50 percent recovery is, in most actions, is fairly extraordinary. The averages are far, far lower than this. 50 percent of your damages now, or zero percent of your damages after losing a trial, is a pretty easy choice to make, I think.

THE COURT: Well, I'm not sure I agree. That doesn't seem to be the case with many of the lawsuits I have.

The item of damages itself is complicated. When you buy a certain price and sell at a lower price, you suffer a loss. But that entire loss is not a recoverable loss. It could be losses in the way stocks operate. And there could be consecutive changes in a market sector that come into play as well. So the regulations, the SEC regulations, provide that you have to take a -- or you could tell me better, but it's an average or a mean 30 days after disclosure to find the price that it settles at. How is that resolved?

MS. WYMAN: What has happened -- and Mr. Rothman can

probably explain this better than I can -- but what has happened is, we have hired an economist, Dr. Feinstein. He was here during the class certification hearing. He has done a statistical analysis that removes the market factors, removes the sector factors, and focuses only on the loss in the price of the security that's attributable to the fraud that's alleged.

THE COURT: And that comes out to $2 billion?

MS. WYMAN: It does, your Honor.

THE COURT: OK. The amounts are large. And in the circumstances, I think it would be fair to have a 50 percent recovery because of the considerations that you point out in terms of the difficulty of proof, the numbers of experts, the length of time that a jury would have to sit, which also comes into play, and therefore I give preliminary approval on that basis as well.

Now, I'm told that, of that 1-plus billion dollars that would be the settlement amount, that the parties identified with ARCP, or, as it's now called, VEREIT --

MS. WYMAN: VEREIT.

THE COURT: -- VEREIT, put up $738,530,000 -- $738,500. And others are putting up the difference of $225 million. Tell me more about that.

MS. WYMAN: Certainly. There are some contributors to the settlement fund apart from the company. $225 million is

being contributed from the AR Capital parties, including Mr. Schorsch and his partners. $12.5 million is being contributed by Mr. Block. And $49 million is being distributed by Grant Thornton. The rest of it, $738.5 million, is being paid into the settlement fund by VEREIT.

THE COURT: And there's something about this payment by the non-VEREIT defendants as being a credit of the VEREIT defendants. Tell me about that.

MS. WYMAN: Well, I can tell you what I know about it. There are several side agreements that were made as part of the derivative settlement that bear on the contribution and indemnity claims that VEREIT and the other AR Capital, Block, and Grant Thornton have amongst themselves. Those agreements don't impact the settlement fund in my case. The settlement fund would remain whole no matter what happens after final approval is had, in this case and in the derivative case. But what you need to understand is, there is a contingency between final approval in our case and final approval in the derivative case.

THE COURT: I can understand that it's required that I approve both. If I don't approve both, neither works.

MS. WYMAN: That's right. And the contingency on the class approval --

THE COURT: But why is the contribution of some defendants cause for a lesser contribution by other defendants?

MS. WYMAN: I'm sorry? I don't understand your question.

THE COURT: The way it's worded is that the contribution of these non-VEREIT parties causes there to be a deduction in how much will be paid by the VEREIT parties.

MS. WYMAN: Well, there is. I mean, VEREIT has agreed to pay $738.5 million towards the class settlement fund. And the balance that remains between that and $1.025 billion is being paid by the other three entities and persons that I just mentioned.

THE COURT: OK. Go on.

MS. WYMAN: You look frustrated. Did I not answer your question?

THE COURT: I'm not sure I understand. But I understand the rough proposition that you can make a settlement for one aggregate amount and then chop it up into different pieces that contribute. Now, if one of the pieces doesn't come through, sometimes other people have to pay more and sometimes the aggregate is reduced. Both settlements can work. This is as reasonable as the other.

MS. WYMAN: Well, my understanding is that the class settlement won't be reduced, even if one of the aggregate pieces does not pay their portion.

THE COURT: Yes. It's clearly stated that way. And you did.

MS. WYMAN: The next factor that we need to look at is the effectiveness of the distribution of the settlement proceeds to the class. That's under Rule 23(e)(2)(c). And our brief has outlined the notice program that is reasonable and the best possible notice that can be given under the circumstances. It involves sending a direct mailing of a notice of settlement that contains all the pieces of information that are required by the PSLRA.

THE COURT: I've read it. It's a very extensive notice.

MS. WYMAN: Yes.

THE COURT: I have some questions with regard to the notice. First is the opt-out exclusion that's in the supplementary agreement.

MS. WYMAN: Yes.

THE COURT: I think I need to review and approve that. I understand why you do not want to make a public statement of the opt-out figure, but can't everything else be made public?

MS. WYMAN: Yes. We would ask that the Court, if the Court is going to review the supplementary agreement concerning the opt-out level, that it be kept in camera and under seal.

THE COURT: Let me see the agreement.

Paragraph 1, page 1, makes reference to one party. Are there supplemental agreements with other parties?

MS. WYMAN: No, your Honor. This is the only

supplementary agreement that there is.

THE COURT: So only this particular party can exercise the opt-out condition?

MS. WYMAN: That's correct.

THE COURT: Why can't we have this agreement filed, having just the amount redacted?

MS. WYMAN: May I speak with Mr. Edelman?

THE COURT: Yes.

Mr. Edelman, speak.

MR. EDELMAN: Your Honor, I think we would be OK with it being filed as long as the amount is redacted.

THE COURT: So do that, please.

MS. WYMAN: Yes.

THE COURT: File a complete copy under seal, and the copy showing the redaction on ECF.

MS. WYMAN: We will do so.

THE COURT: Let me retain this copy.

MS. WYMAN: OK.

THE COURT: Do you have a copy of the notice?

MS. WYMAN: I do.

THE COURT: Page 3, it appears from the reading that there is a disagreement among the settling parties. I think you need to say "the settling parties and the defendants." Oh, "the settling parties," both. That's my error. That's not a problem. I'm sorry. I withdraw that. The settling parties

are both plaintiffs and defendants.

MS. WYMAN: Yes, that's correct, your Honor.

THE COURT: I would like to see in this document some more detail as to what the issues in dispute were, a lengthy paragraph, contributed to by both plaintiffs and defendants, so that the reader of this document would be able to get a better understanding of what the issues are and why they're so difficult.

MS. WYMAN: Yes, your Honor.

THE COURT: Now, this is a very difficult document to understand if you're not a professional. So the likelihood of questions is high. Is there danger to having discussions between your firm alone, your, plaintiffs', firm alone and a questioner, or shouldn't there be some other procedure?

MS. WYMAN: There should be no problem with that. These actually technically are our clients, so we should be able to adequately --

THE COURT: They're not your clients. They're a class. The clients are the representatives whose names appear in the caption. And the whole point of the notice is that people should rely on that. I can't remember if that's a stock clause in other settlement agreements or not. Is it?

MS. WYMAN: It is, yes.

THE COURT: Does anybody have any problem with it, Mr. Edelman or other defendants?

The issue is whether it's appropriate for some member of the potential class who has questions to call up the plaintiff's lawyers.

MR. EDELMAN: We have no objection to that, your Honor.

THE COURT: All right.

Tell me how the summary notice works.

MS. WYMAN: The summary notice is a short-form notice much like the one that we did for the notice of pendency that gets published in the *Wall Street Journal*. That's what the summary notice that we submitted to the Court --

THE COURT: And the point is, give a barebones information, if a person wants more, to get it through the website.

MS. WYMAN: They can get it through the website. I believe that the summary notice also gives them our telephone number.

THE COURT: You're going to create a website, is that it?

MS. WYMAN: There is already a website created. It was created when the notice of pendency was sent out at the beginning of August. And it will be updated and maintained with the settlement information as well.

THE COURT: Is it possible to have this part of -- wise to have it part of the VEREIT website?

MR. EDELMAN: Your Honor, I think we prefer, it's standard in these case, to do it this way, and we prefer not to have it on our website.

THE COURT: How about a reference over from your website? If people have questions and don't remember about the special website, they will know to go to VEREIT.

(Defense counsel confer)

MR. EDELMAN: Your Honor, as I understand it, the derivative settlement will be posted on our website because that is a settlement that pertains to our stockholders, whereas many of the stockholders here are no longer stockholders of VEREIT. It is not standard to have a link on the website, to my knowledge, and we would prefer not to have one.

THE COURT: I think there should be a link. These two settlements are related. They're working together. And I think people can't really make a decision as to one without really considering the other. So there should be a link. And I would order you to create a link so a person will find an easy way to go to the place where this is all set out, all laid out.

MR. EDELMAN: I will confer with the client and we'll see what we can do.

THE COURT: Can you do it now?

MR. EDELMAN: I think we're going to need to talk to the website people, who aren't here. But I understand the

Court's directive.

THE COURT: I've given my preliminary approval, and I'm hesitant to do so unless I know that there's a way that people can find quite easily what they have to look for.

MR. EDELMAN: I understand.

THE COURT: OK. So if it's a problem, let me know, let's say by Tuesday next week?

MR. EDELMAN: Yes, your Honor.

THE COURT: Please, Ms. Wyman, go over the methods of allocation and why different securities have different face prices. Do you want to have one of your colleagues do that?

MS. WYMAN: Yes. Actually, Mr. Rothman was going to speak about those issues to you.

MR. ROTHMAN: Your Honor, getting to your question as to why different securities have different base prices, it's all related to the amount of artificial inflation that was in each of the securities as a result of the alleged misstatements. The expert we hired went through and tried to determine the amount of inflation in each of those securities, and then the plan allocation is designed to compensate people for that inflation. Most of it is based upon the price declines following the revelation of the news on October 29th. So when October 29th came and they disclosed that there were accounting improprieties, the price of the stock dropped, and the expert determined what portion of that price decline was

caused by the omissions and misrepresentations as opposed to other market effects.

So, for example, with respect to the common stock, on October 29th, the price dropped $2.38, and the expert determined that about $2.32 of that was caused by the revelation of the news of the accounting improprieties and the other 6 cents were caused by market and sector factors unrelated to the news.

And with respect to the other securities, he performed a similar analysis, for the preferred stock as well as for the notes.

THE COURT: Wouldn't the price drop attributable to the disclosure be the same?

MR. ROTHMAN: No, because the different securities reacted differently to that disclosure, and different securities were inflated with respect to different amounts. Securities aren't all equal. Some of the notes trade differently than the stock.

THE COURT: So a bond would be affected less than a common stock.

MR. ROTHMAN: That's correct. Or affected differently, not always necessarily less.

THE COURT: Yes. OK. Well said.

MR. ROTHMAN: And the plan allocation follows both the '33 Act and the '34 Act with respect to allocating and

determining a recognized loss for each of the securities.

THE COURT: Is there a distinction made here between a claim under the '33 Act and a claim under the '34 Act?

MR. ROTHMAN: Yes. There are distinctions made in the plan. However, if someone has both a '33 Act claim and a '34 Act claim arising from the same transaction and ARCP security, they get the higher amount under the plan allocation.

THE COURT: Why?

MR. ROTHMAN: Because in most instances the person with the '33 Act claim has a lower damage amount under the plan allocation. But that person also has a '34 Act claim. If there was a false statement made in a registration statement, the purchaser has both a '33 Act claim resulting from that false statement as well as a '34 Act claim resulting from that statement. They shouldn't be able to recover it twice, but they should be able to pursue their '34 Act recovery, and not their '33 Act recovery, which would give them less money.

THE COURT: The '33 Act would give them less money?

MR. ROTHMAN: In most instances it would give them less money.

THE COURT: Why?

MR. ROTHMAN: Because the '33 Act caps damages at the difference between the price paid up to the offering price minus the price on the date suit was brought, which was October 30th. The '34 Act, as your Honor mentioned earlier, the

damages are the price paid minus the price sold -- well, if it's sold within 90 days of the corrective disclosure, it's the average trading price in the period from the disclosure to the date of sale. If it's sold after or held after the 90 days, you get the difference between the price paid and that 90-day lookback price, which is the average price for that entire 90 days. And that, in almost all, I think in almost every -- I shouldn't say I think -- in every instance is greater than the price on October 30th. And when I say it's greater, the difference between the price paid and the 90-day lookback price is greater in every instance than the price paid in the October 30th price. So people will recover more under their '34 Act claim.

THE COURT: OK. All right. Any other points under Rule 23, Ms. Wyman?

MS. WYMAN: There are a few other categories of factors that you need to consider under the rule.

The next one is the terms of any proposed attorney's fees and the timing of the payment of those fees. And the Court obviously has ultimate authority over the fees that are paid in this case. Before TIAA was appointed lead plaintiff, they negotiated with my firm a fee schedule that is based on tiers. And that fee schedule was designed by them to optimize the recovery that the class would get and align counsel's interest in conjunction with the class. And as we stated in

our brief, in the notice, we were going to ask to request a fee not to exceed 13 percent of the settlement fund.

Also in the brief, also, we outlined the fact that we were going to ask the Court to reimburse expenses not to exceed $6 million, which is half of 1 percent of the settlement fund, so we were very mindful in litigating this case to do a diligent job but to keep the expenses in check, to the extent that we could.

THE COURT: You say somewhere in there that you will be giving a detailed analysis to the Court of how much time you put into the case and who put in the time, for what matters.

MS. WYMAN: That's right. When we file our motion for --

THE COURT: I know. But it should clearly say that.

MS. WYMAN: Yes, it does. It says that the brief that we will --

THE COURT: You are asking for a lot of money, and I'm mindful of how people react when a lot of money is awarded. So the proper criteria should be set out, in terms of measurement. I have to look first at how much time you spent in the case. And people should understand that you are getting compensated for, what, five years of litigation?

MS. WYMAN: Yes.

THE COURT: And so many witnesses and so many experts and so on, that the amount of expenses deals with having to pay

experts and other large tickets and the like. Have in mind that there's accountability and you want to look and want the Court to look in a proper fashion with regard to the fee that's awarded.

I'm not making any promises. I'm not saying anything. But clearly the amount has to be a significant amount, and people should understand why that's so.

MS. WYMAN: And when we do our final approval motion, there will be a very --

THE COURT: This is the only notice that's going out at this time.

MS. WYMAN: Yes.

THE COURT: OK. Anything else under Rule 23?

MS. WYMAN: The last category under Rule 23(e) is whether there are any side agreements. We have talked about the only one that there was. It was a supplementary agreement that your Honor has reviewed, and asked us to file under seal and in redacted form on the ECF, which we will do just as soon as possible.

THE COURT: And no others.

MS. WYMAN: And no others.

THE COURT: OK. All right. Before I give preliminary approval, I have to understand the merits of the VEREIT settlement as well. So maybe I should do that now.

MS. WYMAN: Thank you, your Honor.

MR. HOUSTON: Your Honor, Matt Houston of Glancy Prongay & Murray on behalf of derivative plaintiffs.

Your Honor is also, as you have acknowledged, being asked to approve the derivative settlement as part of the global relief sought through these various settlements.

THE COURT: I meant that.

MR. HOUSTON: I'm sorry, your Honor?

THE COURT: How many settlements are there here?

MR. HOUSTON: There are two settlements. There is the class settlement, and the derivative settlement.

THE COURT: You're going to explain the derivative settlement.

MR. HOUSTON: I am. And the derivative settlement, your Honor, is of course brought on behalf of the company, VEREIT. So the recovery that we achieved in our case is really funds coming into VEREIT or for the benefit of VEREIT, which makes it very different obviously than the class action, which is for a group of shareholders of VEREIT for a particular period of time.

With respect to the action that we have, our claims are based on Maryland breach of fiduciary duty. These are not federal securities claims, but, rather, claims that VEREIT had against individual defendants. This is important because the recovery that is being obtained, or for which our action is the conduit, is bringing money from individual wrongdoers into

VEREIT.

The benefit here is, as your Honor has briefly outlined, we would aggregate that number at $286,500,000. That is basically the total contribution of all of the non-VEREIT settling defendants. Our action was the one in which those individuals said they would not agree to make any individualized payments but for the release of the claims in the derivative action, because of the fact they had liability vis-a-vis the company.

The amount that's being brought into the company through the derivative settlement is indeed part of the global amount that is going to be used to satisfy the class action. Your Honor had --

THE COURT: Some of the $786 million that VEREIT is coming in comes from people who are defendants in the derivative suit.

MR. HOUSTON: Not exactly, your Honor. That 786 -- or 56 -- number is the amount that VEREIT is paying to satisfy the class action. Where the benefit of our action is with respect to bringing in individual contributions is that it limited the amount that VEREIT had to pay in the settlement. Absent the contribution by these individuals, VEREIT would have had to pay more to satisfy the class action. So one way to think about it is, this is indeed a limiting factor on how much the company has had to pay out, but does not necessarily pertain to the

756.

The amounts that are being paid here, as I mentioned, are amounts that are being paid with release of claims. What makes this an extraordinary settlement, your Honor, is that these amounts are being paid directly by individual defendants, as opposed to insurance proceeds under D&O policies. As your Honor is well aware, this case has been pending a long time, a lot of proceedings. The D&O insurance coverage in this case was long ago extinguished.

THE COURT: In payments.

MR. HOUSTON: In payments, indemnity payments, in payments of opt-out cases, in payouts by the company, or for the benefit of the company.

So it was very important that we were the mechanism or conduit to say, OK, there is no more insurance, how do we get more money in. And the way we do that is from who we have alleged are the wrongdoers.

So the fact that the individual contributions coming in of $286,000, which I'll tell the Court is unprecedented, we don't see a contribution by personal individuals, in class or derivative litigation, ever that large. But because that money is coming in, it's money that is a benefit to VEREIT because they do not have to satisfy any more of the judgment, or settlement, rather, that's being used to pay the class action.

THE COURT: Some of these, all of the defendants being

sued by VEREIT in the derivative suit are defendants in the class action as well.

MR. HOUSTON: Yes, they are.

THE COURT: So they are paying out a certain amount of money, and dividing that payout into the class action and into the derivative action. So I don't know that there would have been a difference.

MR. HOUSTON: There would have been a difference because of the fact that, without it being a global settlement of all claims, there wouldn't have been any payment by the individuals. That's stated in the stipulation. Representations have been given to us that they would not have settled.

THE COURT: If there had not been a derivative action, the amount of money paid by the defendants would perhaps have been exactly the same, the settlement class action.

MR. HOUSTON: It's entirely possibly, your Honor, but there was a derivative settlement.

THE COURT: I understand. There had to be. Otherwise there could not be a settlement. But in my mind it's hard to figure out what exactly was the added value from the derivative suit.

MR. HOUSTON: In addition to the payment of the 286 million, which, again, the parties identified as, but for the settlement of the derivative suit, they would not have made,

quote, any payment.

But setting that aside for the moment, we also secured the benefit of additional agreements, which are, we've called the springing agreement and the agreements between the various parties.

The springing agreement, your Honor, is designed to assure that VEREIT will get the benefit of the payment of these individual contributions even if this settlement, approved by this Court hopefully, but overturned on appeal, that money would not have to be returned back to the individuals. In fact it would be a credit on a payment, but the same amount of money would remain with VEREIT. So in essence we've guaranteed that, regardless of what happens to the ultimate resolution of this derivative suit, the payment made by these individuals is secured by VEREIT, obviously of a benefit to the company itself.

THE COURT: If there's a sufficient number of opt-outs to pass a threshold and VEREIT opts not to settle, what happens to your settlement?

MR. HOUSTON: Then we would not have a settlement, because the way that it's structured is, it's a mutually approved --

THE COURT: If the money comes in to VEREIT, only in the context of my not giving them final approval or my approval being overturned by the Court of Appeals?

MR. HOUSTON: A slight variation on that, your Honor. If your Honor does not give approval to either the class settlement or the derivative settlement, there is no settlement of either case. If your Honor approves the settlement of both cases but we then face someone who appeals our settlement, takes it up to the Second Circuit, at that point, if it's reversed, we would still -- that's where the springing agreement kicks in -- we would still make sure the money remains with the company.

Lastly, part of the settlement here is an agreement for all non-VEREIT settling defendants to stand down on counterclaims. The one of particular interest here is Grant Thornton. The Grant Thornton counterclaim was one that, while not made formally, was one that was certainly present in everyone's mind during the discovery and the depositions of the Grant Thornton personnel. It is something that we believe we've helped the company by not only guaranteeing --

THE COURT: What was the counterclaim?

MR. HOUSTON: There was no counterclaim filed. What we anticipated the counterclaim to be would be that, as the independent auditors of ARCP, Grant Thornton would have taken the position that they were the subject of misrepresentations from VEREIT itself and VEREIT personnel, such that they would therefore have a counterclaim back against them to the extent that they have any liability in the case.

THE COURT: In other words, if Grant Thornton was liable in a class action, you were concerned that Grant Thornton would allege that they were misled, contrary to the representations made to Grant Thornton when Grant Thornton was engaged.

MR. HOUSTON: Yes, your Honor. And this was something that was very much an issue during discovery. We heard, on repeated occasions -- and I'm here not to carry Grant Thornton's brief exactly on this -- but we heard on many occasions that Grant Thornton also alleged, made the argument, that AFFO is not a GAAP measure and therefore was not something that they were required to opine upon. So that would have also further complicated matters.

As part of the derivative settlement, though, all of the parties agreed to stand down on potential counterclaims, which, again, is a benefit for VEREIT insofar as it provides assurance about where and when the terms of the settlement will be applicable.

The standards for requirement of preliminary approval in a derivative action are not as specifically stated as it is in 23(c). 23.1 does not say what standards the Court should use to consider. We nonetheless believe that the Court, at this stage, for many of the reasons expressed by Ms. Wyman and Mr. Rothman, we feel we meet the same standards. We'll obviously have to present those standards as well at final

approval. But I'm happy to go through those factors as well.

THE COURT: How did you get the number attributable to the VEREIT settlement?

MR. HOUSTON: The number that is attributable, the 286.5 million, is the 225 million made by AR defendants, the 12.5 million made by Mr. Block, and 49 million made by GT. All of those parties are what we've used in our papers and settlement documents to refer to as the non-VEREIT settling defendants.

THE COURT: How did you come about the number? How did that get negotiated?

MR. HOUSTON: That number was a subject of using our derivative claims, going to defendants, saying, you need to make them independent and individualized contributions to the settlement. We've made presentations as part of the mediation and as part of direct settlement negotiations outlining particular claims that the derivative plaintiffs had, and that was the basis presumably for that final number.

THE COURT: If I were to feel that the derivative action did not contribute value to the overall settlement because the amount that ultimately was recoverable by the class, 1.025 billion would have been the same if there had been a or had not been a derivative action, would I be off base?

MR. HOUSTON: You would be off base because of what the settlement documents say, which is that the parties, the

non-VEREIT settling defendants specifically acknowledge that, but for the settlement of the derivative action, they would not have made any contribution. And that is plainly stated within the settlement agreement. Therefore I think you would be off base, your Honor, because of the fact that the parties have acknowledged it was part of the settlement.

THE COURT: OK. I hear.

MR. HOUSTON: 23.1 requires the Court to determine that there's reasonable notice. The notice plan that we have proposed is one similar to most derivative actions currently being approved these days, which is primarily publication on the company website and a publication in *Investor's Business Daily*. The case here is a little different than the class case insofar as there is no claim form and it's a notification of current shareholders, or at least shareholders on the date of the signed stipulation, September 27th, I believe, that it is the necessary notice. Obviously the party of greatest interest here is VEREIT itself. These derivative claims were brought on behalf of VEREIT. VEREIT plainly has notice of these claims. Our notice program is designed to alert current shareholders of VEREIT that this settlement has been preliminarily approved and when the final hearing would be.

THE COURT: Where will I find your notice?

MR. HOUSTON: We have two notices. We have a direct long-form notice that is Exhibit A1. So if you look at my

declaration, and behind that you'll see Exhibit 1, which is the stipulation, and then Exhibit A1 to that stipulation is the long-form notice, and then A2 is the summary publication notice.

THE COURT: OK. Anything else?

I grant the preliminary approval to the derivative settlement as well, on the basis of a properly broad case. It had to be resolved and it was resolved on terms that were consistent with and perhaps additive to the benefit achieved in the class action. So through this overall settlement, VEREIT is quit, assuming final approval, of a great burden of litigation on the individual officers and former officers and directors and present officers and directors of VEREIT and of Grant Thornton and of others as well. The settlement is fair and reasonable, both settlements. And I give preliminary approval to both.

So I need to file a signed order, right, Ms. Wyman?

MS. WYMAN: Yes, your Honor. That's the case. And a number of deadlines get kicked off of that.

THE COURT: All right. So would you and my law clerk get together on dates and fill those in, and I'll sign the order of preliminary approval tomorrow.

MS. WYMAN: All right. Thank you, your Honor.

MR. HOUSTON: Thank you.

THE COURT: But I can't sign, actually, until I hear

from Mr. Edelman.

MR. EDELMAN: Your Honor, you've heard from Mr. Edelman. We will post the class notice. We will find a way to link the class notice on our website.

THE COURT: Excellent. OK. So I'll sign tomorrow.

MS. WYMAN: Great. Thank you very much, your Honor.

THE COURT: Thank you all.

By the way, this is Henry Ross's next-to-last day.

MR. EDELMAN: Congratulations. Thank you.

THE COURT: He's a very valuable person.

Brittany Sykes will assume responsibility on Monday.

THE LAW CLERK: Thank you, Judge.

(Adjourned)